BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICKY D. WIEHE	)	
Claimant	)	
	)	
VS.	)	
	)	
TONY SCHUETZ CONSTRUCTION	)	
Respondent	)	Docket No. **1,018,499**
	)	
AND	)	
	)	
WESTERN AGRICULTURAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 14, 2009 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on January 20, 2010.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

At the regular hearing held on August 18, 2009, respondent filed a Motion to Dismiss for lack of prosecution pursuant to K.S.A. 44-523(f). The Administrative Law Judge (ALJ) took the issue under advisement and stated he would address the motion when he rendered his decision. In his Award, the ALJ determined claimant had failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. The ALJ concluded the remaining issues were moot and consequently, he did not decide the respondent's Motion to Dismiss.

Claimant requests review of whether the ALJ erred in failing to grant claimant compensation for his accidental injury occurring on August 12, 2004.

Respondent argues that pursuant to K.S.A. 2006 Supp. 44-523(f) the claim should be dismissed, in the alternative respondent further argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board must determine whether this claim should be dismissed for lack of prosecution pursuant to K.S.A. 2006 Supp. 44-523(f).

Respondent argues that the claim against it should be dismissed as the application for hearing was filed on August 17, 2004, but the case did not proceed to a full hearing within five years of that date. Consequently, respondent argues the case should be dismissed pursuant to K.S.A. 2006 Supp. 44-523(f).

The Kansas Legislature amended K.S.A. 2006 Supp. 44-523(f) effective July 1, 2006, to provide:

> Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively especially when the amendment to an existing statute creates a new liability not existing before or changes the substantive rights of the parties.[1] Moreover, it is an

[1] *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

axiom of workers compensation law that the substantive rights between the parties are determined by the law in effect on the date of injury.[2]

Mickey D. Wiehe's alleged accidental injury occurred on August 12, 2004. He filed his application for hearing on August 17, 2004. The regular hearing (final hearing) was held on August 18, 2009. And the amendment to K.S.A. 2006 Supp. 44-523(f) was effective July 1, 2006.

The amendment to K.S.A. 2006 Supp. 44-523(f) does not express a clear intent that it is to operate retroactively and such an application of the statute could clearly affect Wiehe's substantive rights. The statutory amendment should be applied prospectively and accord all claims the same five-year period before they are subject to dismissal.[3] Because the substantive rights of the parties to a workers compensation claim are determined by the law in effect on the date of injury the amendment to the statute applies to accidents that occur on or after its effective date. The Board denies the respondent's motion to dismiss.

Wiehe, a high school graduate, has worked as an operator for respondent for approximately 12 years. His job includes operating backhoes, trenchers, boring units, shovel and other construction equipment. Wiehe described his accident on August 12, 2004, as follows:

> I went into the shop, unlocked the shop and I noticed I left my lunch box from the day before and I know myself if I don't get it I'll forget it the rest of the week. So, I took it back out and put it in my truck, walked back to the shop and my knee popped twice and I just went down, and that's when I called Tony and told him what happened.[4]

On cross-examination, Wiehe testified that he was in a parking lot between the shop and his truck when his knee popped.

Q. And your pay starts at 7:00 o'clock.

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[2] *Lyon v. Wilson,* 201 Kan. 768, 443 P.2d 314 (1968).

[3] To be clear, the Board has concerns about the constitutionality of K.S.A. 44-523(f). This statute has no provisions for basic due process. There is no requirement that notice be given nor is there an opportunity to be heard. The statute seems only to serve as a means for respondents and insurance carriers to close their files on claims without a full and fair airing of the facts. It would seem that the purpose of the statute is to achieve some sort of dismissal docket. And if that is indeed the purpose then the Division should promulgate regulations that would meet the minimal requisites of due process in order to achieve the intended purpose of the statute.

[4] P.H. Trans. at 5-6.

A. Unless I clock in early, you know, like I usually do.

Q. Right, but on the 12th you hadn't clocked in.

A. No, sir, I had not.

Q. And the errand that you were making was to take your personal item of yours that you left the day before back to your truck.

A. Yes.

Q. And the problem that you have is with your right knee?

A. Yes.[5]

Wiehe testified that he did not trip or fall on anything, he was just walking when his knee popped once or twice and he went down.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The ALJ analyzed the facts in the following fashion:

> Here, the claimant has testified that he did not fall, nor was there any incident related to the pavement, that caused his injury. Hence, the popping sensation that claimant experienced must be considered a personal risk, and as such, no benefits pursuant to the laws of the State of Kansas Workers Compensation are applicable. See *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

The Board agrees and affirms. In *Hensley*[8], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. The Board finds a direct connection between Wiehe experiencing two instances of popping in his knee and then falling. Rather

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[5] P.H. Trans. at 14-15.

[6] K.S.A. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

than being an unexplained fall, this would be a personal condition of the employee.[9] Where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.[10]

In this instance, the facts and circumstances surrounding Wiehe's fall do not remove it from the normal activities of day-to-day living. He did not slip or trip on anything in respondent's parking lot, nor was there anything about his daily work activities that led him to fall on August 12, 2004. In fact, Wiehe had not clocked in to start his work activities. While K.S.A. 2006 Supp. 44-508(e) does not exclude "accidents" but rather excludes injuries where the "disability" is the result of the natural aging process or the normal activities of day-to-day living, simply injuring his knee while walking and consequently sustaining a fall in respondent's parking lot does not entitle Wiehe to benefits under the facts of this case. Stated another way, the fall was the result of his injury not the cause of the injury.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated October 14, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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[9] *See* 1 *Larson's Workers' Compensation Law* § 9.01[1].

[10] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

CONCURRING IN PART AND DISSENTING IN PART OPINION

The undersigned members concur in the majority's decision to affirm the ALJ's determination that claimant failed to meet his burden of proof that he suffered an accidental injury arising out of and in the course of his employment but dissent as to the majority's decision to deny respondent's Motion to Dismiss pursuant to K.S.A. 2006 Supp. 44-523(f).

In *Owen Lumber Co.*[11], the Kansas Supreme Court stated:

> [W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:
>
> > '[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute's effect on previously acquired rights. The Court has recognized that the removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.'

Under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, it is not a procedural amendment only. But in those cases, as in this instance, where the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute the claim, the statute's effect may not be procedural as to that claim and the amendment could be applied retroactively.

The new subsection would affect a claimant's substantive rights if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus "blindsiding" the claimant with a dismissal. Conversely, if the five-year period had not expired by the time the statute took effect the claimant may have time to

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[11] *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

proceed to final hearing or show good cause for an extension of time. Under such circumstances the claimant should have a reasonable opportunity to comply with the new subsection's procedural requirement before it is given retroactive application. The test is what constitutes a reasonable time from the effective date of the amendment until the five-year period expires. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should also alert counsel to the need to prosecute a claim and be factored in to the determination of what constitutes a reasonable time.

The date upon which K.S.A. 2006 Supp. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute should not operate retroactively if it is applied to an application's "fifth anniversary" date that fell before the statute became effective. But in those cases where the application's fifth anniversary falls after the effective date of the statute, the statute may be applied with retroactive effect where it is reasonable to do so. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period."

The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue his rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

Under these facts, the effective date of the statute was July 1, 2006. The fifth anniversary of claimant's application for hearing did not occur until over three years later, on August 17, 2009. Thus, under the minority's view, it is reasonable to apply the statute retroactively in this case. Although a dismissal without notice is a troubling procedure, that is the procedure the Legislature has enacted and it should be applied in this case.

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge